No. 18836

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM LUCIAN COBB, ET AL., APPELLEES

Appeal From The United States District Court For The Northern District of California

BRIEF FOR THE UNITED STATES, APPELLANT, OR IN SUPPORT OF ALTERNATIVE PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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OPINIONS BELOW

The district court entered unreported memorandums and orders in this case on May 18, 1962, August 8, 1962, and March 14, 1963 (R. 50, 64, 71).

JURISDICTION

The district court had jurisdiction over the condemnation proceeding instituted by the United States under 28 U.S.C. sec. 1358. The order of the district

court denying the Government's motion for an order of immediate possession and vacating and setting aside the declaration of taking was entered on March 14, 1963. The notice of appeal from this final order was filed on May 13, 1963. This Court has jurisdiction over the appeal under 28 U.S.C. sec. 1291. This Court has jurisdiction under 28 U.S.C. sec. 1651(a) to issue a writ of mandamus or prohibition.

QUESTIONS PRESENTED

1. Whether the district court has authority to dismiss a declaration of taking filed by appropriate officials of the executive department pursuant to 40 U.S.C. secs. 258a-258f, after the sum estimated by the acquiring agency to be just compensation has been deposited with the court.

2. Whether the district court has authority to dismiss a declaration of taking, which is otherwise regular, because of an alleged lack of good faith on the part of the proper administrative authorities in estimating just compensation.

STATEMENT

The United States, on October 23, 1961, filed its complaint and declaration of taking to take such easements and rights of way, if any, as the United States did not already have, to use, reconstruct, improve and maintain the existing Elliott Creek Road No. 193, and to construct, reconstruct, use, improve and maintain the proposed Dutch Creek Road No. 193A (R. 4). The estates and interests set out in the complaint

were over and upon unpatented mining claims within public domain lands reserved and administered as part of the Rogue River National Forest in Siskiyou County, California (R. 4, 21). Since the commencement of the suit, a patent has been issued on one of the mining claims (R. 72). This patent was issued subject to the declaration of taking involved here (*Ibid.*). The complaint and declaration of taking covered also the right to reconstruct, use, improve and maintain any segment of the roads destroyed through mining operations, and the right to construct, use, improve and maintain in such manner as will not materially interfere with mining operations such temporary bypass roads during mining operations as are made necessary by the destruction of the roads (R. 4, 22).

The complaint and declaration of taking reserved to the owners of valid mining claims the right to conduct mining operations on the lands described, including the right to destroy the existing Elliott Creek Road No. 193, the proposed Dutch Creek Road No. 193A, and temporary bypass roads where the owners deem the destruction necessary to the exercise of the mining operations (R. 4, 22). To the owners of valid mining claims was also reserved the right to use these roads and cross on, over or underneath them in such manner as would not endanger the road (R. 5, 23). The sum estimated as just compensation for the taking of the estate and interests described in the declaration of taking was $1.00, which was deposited (R. 23).

The appellees W. L. Cobb, *et al.*, filed an answer and subsequently an amended answer in which they challenged the taking on the ground that (1) it was not for a public use, (2) it was not authorized by law, and (3) the declaration of taking should be stricken because the estimate of just compensation was not made in good faith (R. 37, 42). The amended answer alleged the taking was not for a public use on the following basis (R. 43-44). In January 1956, Bate Lumber Company and others entered into a contract with the United States Department of Agriculture, Forest Service, wherein Bate agreed to construct Elliott Creek Road No. 193 and Dutch Creek Road No. 193A. Bate agreed to acquire the easements for the road right of way across all mining claims traversed. Bate has not acquired such easements, and it is alleged that the United States in this proceeding is attempting to fulfill the contractual obligation of Bate. The amended answer alleged that the condemnation proceeding was not authorized by law because no appropriation had been made, and because the easement sought was too vague (R. 44).

Finally, it was alleged that the deposit with the declaration of taking was not made in good faith, that a reasonable estimate of just compensation would be in excess of one million dollars for the reason that the 21 mining claims of the appellees will be bisected by the road easements which will render it economically impractical for the appellees to operate their claims (R. 44-45.).

The United States filed a motion to strike the amended answer, grant judgment on the pleadings

and issue an order of possession (R. 48). After memorandums in support of and in opposition to the Government's motion had been submitted, the district court entered its order and memorandum of May 18, 1962. The court held that the estate described in the complaint and declaration of taking was sufficiently specific (R. 51-52). The court held that the use was a public one, and the fact that the road was to be built by a private owner under agreement with the Government does not change the public purpose (R. 53-54). However, the court found that it had the power and duty to determine whether the amount of the deposit was in fact an estimate of just compensation arrived at in good faith (R. 54-56). The court thought the issue should have been raised by an independent motion to dismiss the complaint and declaration of taking, rather than in the answer (R. 56). Accordingly, the district court ordered paragraphs 3, 4 and 5 of the amended answer stricken, and granted the Government's motion to deny the demand in the answer that the complaint and declaration of taking be dismissed (R. 56-57). The Government's demand for judgment on the pleadings and for immediate possession was denied (R. 57).

Appellees thereafter filed their motion to dismiss the complaint and declaration of taking (R. 58-61). The Government filed a motion to reconsider or, in the alternative, for an interlocutory appeal (R. 62). After further briefing, the district court entered its order of August 8, 1962 (R. 64). On reconsideration, the district court decided that the appellees' motion

to dismiss the complaint was properly a part of the answer, and reinstated paragraph 5 of the amended answer which had previously been stricken (R. 65). The court reiterated its previous position that it had jurisdiction to inquire into the issue of good faith in the estimate of the deposit (R. 66 *et seq.*). The Government's motion for an interlocutory appeal was denied (R. 67).

The hearing before the district court on the good faith issue was held on December 17, 1962. At that hearing the Government, after re-emphasizing its position that the court was without jurisdiction to hear evidence on the issue, presented Mr. Milvoy Suchy, a mining engineer with the Department of Agriculture (R. 91-137). Mr. Suchy graduated from the Colorado School of Mines in 1938 and has been actively engaged in mining or closely related fields since then except for two and one-half years during the war (R. 92-93). He has been acquainted with the appellees' placer mining claims since 1957 (R. 94). The Elliott Creek Road was in existence at that time (R. 96). It was a private road which had been built by Bate Lumber Co. (R. 97). Mr. Suchy made a report with reference to the present condemnation proceeding about these mining claims in the first part of 1961 (R. 98). He was advised that the Government intended to condemn a road right of way over these mining claims (*Ibid.*). It was his understanding that the land was owned by the Government as part of the national forest on which there were certain rights outstanding in the form of mining claims (R. 99). The Government was trying to get the right

to use the road which had already been built across these mining claims (*Ibid.*)

Mr. Suchy related the circumstances under which the road had been built. The Bate Lumber Company had obtained an easement across the Rogue River National Forest, subject to all valid mining claims (*Ibid.*). It had proceeded to obtain easements across the mining claims, but they were obtained from the wrong party and the road built on that basis (*Ibid.*). The appellees had then commenced a suit in Siskiyou Superior Court against Bate for trespassing damages and recovered $10,000 (R. 99-100). This testimony was later withdrawn, but the parties agreed that there was a suit brought and certain damages were awarded along with a permanent injunction against Bate Lumber Company (R. 102).

Mr. Suchy had examined the declaration of taking and his understanding of the estate to be taken in this case was as set forth in it (*Ibid.*). Mr. Suchy then produced the report dated January 23, 1961, giving his opinion as to what damages, if any, would be done to the appellees' mining claims by virtue of the taking described (R. 103). This was introduced as Plaintiff's Exhibit 3 (R. 104). In this report, Mr. Suchy concluded that appellees' mining rights would not be damaged by this interruptable type easement (R. 104).

There was next introduced in evidence as Plaintiff's Exhibit No. 4 a letter dated October 4, 1961, from the Secretary of Agriculture to the Attorney General, conveying the initial documents for the condemnation proceeding and setting forth the reason for the deposit of $1.00 as estimated just compensation (R.

105). With this evidence, the Government completed its showing of a prima facie compliance with the declaration of taking procedures.

On cross-examination it was developed that Mr. Suchy did not assign any dollar value to the claims (R. 107). He did not believe there would be any damages for the easements which the Government was now taking because the owners of the claims had been paid $10,000 by the judgment in the Superior Court of California for Siskiyou County (R. 107). That amount had been paid entirely by Bate, the Government not being a party to that proceeding (R. 108). If Mr. Suchy's assumption that all damages were paid for by the $10,000 judgment in Superior Court were erroneous, then he would say his report was wrong (R. 109). Under questioning from the district court, Mr. Suchy gave the following as the basis for his estimate of damage (R. 114):

> A. When I examined the mining claim, sir, I went there with the idea of determing [sic] what damage would be done to the claimant in his mining operation if he was allowed to remove the road. It was interruptable type easement. I came to the conclusion that since the material that covers his placer deposit had been the subject of a previous State proceeding and he was awarded $10,000 damages for the removal of this material, it didn't make any difference whether it was removed by, say, a drag line or if he went in there and removed it and then mined it. He could do it either way. As long as the road easement is interruptable he can mine under the road. The material from the

> road, the damage that has been done, has already been paid for, sir.

After some confusion, finally clarified by government counsel, Mr. Suchy was asked by counsel for the appellees (R. 118):

> Q. Now isn't it true that a prospective purchaser, sir, of these two claims would pay less for the claims with an easement for a road across them than what he would pay without such an easement?
>
> A. An interruptable easement which would allow him to mine without being held for damages to the road I don't believe would affect the price materially.

There followed in the cross-examination extensive questioning about the details of Mr. Suchy's report and the mining operations involved on the appellees' mining claims (R. 118-123).

During the course of this cross-examination, government counsel objected to the line of questioning as being argumentative (R. 130). Government counsel then stated (*Ibid.*):

> Again I would like to emphasize, let's assume argumento [sic] that this witness is absolutely wrong in his opinion of value as opposed to the opinion of value of the defendants. That isn't the issue here. The issue is whether or not he submitted an estimate as to the damages of this particular easement to the Secretary of Agriculture and the Secretary of Agriculture had a right to rely thereon.

After further colloquy between counsel and the district court, the district court took the case under submission and asked for further memorandums from counsel (R. 137-146). During this colloquy, the district court commented (R. 141, 142):

> The thing that plagues me is the fact that I cannot conceive in this day and age how anything can be worth only one dollars [sic]. I don't know what you can buy with it. I have just been over to the Philippines, and, of course, the standards over there are so much different from ours. You are a little shocked when you hear that a person receives 30 pesos for a month's labor. That is about $7.50 a month pay. Many families are having to struggle along and live on that.
>
> * * * *
>
> That is what is plaguing me about this matter here. I just can't conceive of anything being worth only a dollars [sic]. That is what bothers me.
>
> If the Government had seen fit to put up $500 or $1,000 I wouldn't even give a second thought to this matter here, I would pass it away immediately; but when they put up a dollar it looks to me like it is really an insult to the defendants in the case.

On March 14, 1963, the district court entered its third and final memorandum and order (R. 71-82). In this memorandum, the district court was of the view "that the requirement of estimated just compensation as the basis for a deposit (as contemplated by § 258a) includes a requirement that such

estimate be made in good faith. I am also of the view that any contention that a bad faith estimate has been made is cognizable before the courts * * *" (R. 73). The court made a distinction between the inquiry into good faith and "an inquiry * * * into the sufficiency of a deposit, which clearly is impermissible * * *" (R. 73). After reviewing the testimony of Mr. Suchy, the district court came to the conclusion that Mr. Suchy's determination of nominal damages was based on erroneous legal assumptions and therefore the deposit was not made in good faith "that is, with a reasonable basis for belief as to its accuracy" (R. 79).

The court then proceeded to examine the question of whether the declaration of taking should be dismissed (R. 79-82). The court was of the opinion that the cases are "in hopeless conflict as to whether a United States District Court has authority to vacate a declaration of taking, where a showing of lack of good faith is made" (R. 80). The district court noted that the Ninth Circuit has indicated no such authority exists "under ordinary circumstances" (*Ibid.*). However, the district court thought an exception could be made where there is "the additional element of a failure to comply with the good faith requirement * * *" (*Ibid.*). Accordingly, the district court vacated and set aside the declaration of taking without prejudice to the Government to file an amended declaration of taking. This appeal followed.

SPECIFICATION OF ERRORS

The errors of the district court are:

1. The Memorandum and Order of March 14, 1963, which ordered the declaration of taking to be set aside and vacated and which denied the United States immediate possession of the property involved (R. 82).

2. The holding of the Memorandum and Order of March 14, 1963, that 40 U.S.C. sec. 258a "includes a requirement that such estimate [of just compensation] be made in good faith" (R. 73). The further holding at the same place that "any contention that a bad faith estimate has been made is cognizable before the courts * * *" (R. 73).

STATUTES INVOLVED

The Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. secs. 258a-258e, provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United

States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court.

No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

Sec. 2. No appeal in any such cause nor any bond or undertaking given therein shall operate to prevent or delay the vesting of title to such lands in the United States.

Sec. 3. Action under this statute irrevocably committing the United States to the payment of the ultimate award shall not be taken unless the chief of the executive department or agency or bureau of the Government empowered to acquire the land shall be of the opinion that the ultimate award probably will be within any limits prescribed by Congress on the price to be paid.

Sec. 4. The right to take possession and title in advance of final judgment in condemnation proceedings as provided by this Act shall be in addition to any right, power, or authority conferred by the laws of the United States or those of any State or Territory under which such proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such right, power, or authority.

Sec. 5. In any case in which the United States has taken or may take possession of any real property during the course of condemnation proceedings and in advance of final judgment therein and the United States has become irrevocably committed to pay the amount ultimately to be awarded as compensation, it shall be lawful to expend moneys duly appropriated for that purpose in demolishing existing structures on said land and in erecting public buildings or public works thereon, notwithstanding the provisions of section 355 of the Revised Statutes of the United States: *Provided,* That in the opinion of the Attorney General, the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein.

The Act of October 21, 1942, 56 Stat. 797, 40 U.S.C. sec. 258f, provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any condemnation proceeding instituted by or on behalf of the United States, the Attorney General is au-

thorized to stipulate or agree in behalf of the United States to exclude any property or any part thereof, or any interest therein, that may have been, or may be, taken by or on behalf of the United States by declaration of taking or otherwise.

SUMMARY OF ARGUMENT

Introductory.— Before the broad legal issues in this case are discussed, it will be helpful to note the precise factual background of the case. The "bad faith" which the district court found was, in substance, that the fully qualified mining engineer whom the Secretary of Agriculture had chosen to make an estimate of damages took into account the fact that an existing road was being condemned and damage caused by its construction had been paid by Bate Lumber Company. This was a fact which the district court did not think should be considered in estimating just compensation. The decided cases suggest that "bad faith" is the equivalent of "fraudulent action" or "actual malevolence or spite" and not merely poor judgment or careless planning. But the strongest case against the Government would be a charge that it erroneously interpreted unsettled law. There is nothing to show that governmental officials were motivated by fraud, malice or personal ill will against the appellees.

As in all cases where there is alleged to be a lack of good faith, it is simply the refusal of the district court to agree with the economic and legal result reached by the administrative officials. The district court cannot so substitute its judgment for that of the

responsible administrative officials. It is apparent that the district court was chiefly disturbed by the fact that only one dollar was deposited. The United States may use a condemnation suit to effect a quiet title. The nominal deposit is simply an assertion that the United States already owns the property right described in the complaint and declaration of taking except for mere technical rights outstanding.

I

The district court has no jurisdiction to dismiss a declaration of taking. When the United States filed its declaration of taking and deposited estimated just compensation, title to the estate described vested in the Government. Thereafter, the district court is powerless to dismiss the proceeding or the declaration of taking. The district court indicated that it was cognizant of that rule as stated in the cited decisions of this Circuit. The district court proceeds to find an exception, however, "where a showing of lack of good faith is made." It has already been noted that no showing of bad faith by government officials has been made in this case. Moreover, as will be shown, the "bad faith" exception which the district court purported to find does not exist at all.

II

The allegation of the defendant in a condemnation suit that the estimate of just compensation for a declaration of taking has been made in bad faith does not present a justiciable issue. There is no conflict of authorities on this point, and no final decision which

supports the district court's asserted jurisdiction. To the contrary, the Fifth Circuit has ruled that the purported bad faith exception to the rule of finality of the administrative estimate of just compensation does not exist. *In re United States*, 257 F.2d 844 (1958). We now show why this decision should be followed by this Court.

"Good faith" and "bad faith" are not statutory standards. The statute simply requires that the acquiring agency deposit estimated compensation with the court. There is no question but that this has been done. The purposes of the Declaration of Taking Act were to give the Government immediate possession and to relieve it of the burden of interest on the sum deposited as estimated compensation. Second, it gives to the former owner, if his title is clear, immediate compensation to the extent of the Government's estimate. The Supreme Court decisions make it clear that the estimate is tentative. The possibility is contemplated that administrative officials may intentionally underestimate the value of property to protect the Government. This view is premised on the administrative estimate being conclusive. Congress gave the acquiring agency, not the courts, the function of estimating compensation for this purpose. The lack of court review is evident from the fact that title changes when the estimated compensation is deposited in court without the necessity of any court order. The delay necessarily resulting from court examination of the deposit in adversary proceedings also demonstrates the lack of juris-

diction for such an undertaking. These time-consuming procedures are directly contrary to the purposes of the statute, which was enacted to prevent delay of government projects by legal proceedings. In providing estimated compensation, Congress was conferring a benefit on the landowner not constitutionally required, as the Government may always seize the land so long as it provides a remedy under the Tucker Act. There is no justification for enlarging the grant to include the power to control the amount of the deposit.

In re United States, supra, refused to imply such power. The Fifth Circuit rejected the view that the district court could vacate a declaration of taking and refuse to give the Government possession. It deemed the settled law to be that the purported bad faith exception to the rule of finality of the administrative estimate of just compensation did not exist. The three cases relied on by the district court for the bad faith exception were either reversed on the ground there is no authority to vacate a declaration of taking or were decided on other grounds with the good faith issue expressly left open.

The district court examined the two leading cases of this Court and other cases holding it is beyond its power to vacate a declaration of taking, and concluded that the cases appear to be in "hopeless conflict." The district court acknowledged that this Court's decision "indicated no such authority exists under ordinary circumstances (i.e., where there is a failure to make a showing of bad faith) * * *." Good faith or bad faith are not discussed by this Court's de-

cisions, nor is any exception intimated to the rule that once title vests by the deposit of estimated compensation the court is powerless to vacate it. The other cases in which the district court purported to find a "hopeless conflict" do not contain a single instance in which the dismissal of a declaration of taking has been sustained.

III

If the order dismissing the declaration of taking is not an appealable order, it is requested that this brief be treated as in support of a petition for mandamus.

A. The Government believes the order is appealable under the collateral orders doctrine. The deposit of compensation, transfer of title and possession under the Declaration of Taking Act procedure are entirely separate from the issue of just compensation. It therefore falls into that class of orders which finally determine claims of right separate from, and collateral to, the rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. It is recognized that this is a close question, but a distinction must be made between this case, where the declaration of taking was dismissed, and those cases where it is held valid. While the order dismissing an action is final and appealable, one that refuses to dismiss is not.

B. In any event, the district court's order dismissing the declaration of taking may be properly re-

viewed by this Court by writ of mandamus or prohibition. The matter at issue is the Government's right of possession pending the determination of just compensation. Once compensation has been determined, the right of possession will become moot. Therefore, appeal is an inadequate remedy. An even stronger reason for mandamus is that the district court ruled on a matter beyond its jurisdiction. The historic use of the writs of mandamus and prohibition has been to confine the inferior court to the lawful exercise of its prescribed jurisdiction. The authority of this Court in the matter is not confined to writs in aid of a jurisdiction already acquired but extends to those cases which are within its appellate jurisdiction, although no appeal has been perfected.

ARGUMENT

Introductory.—This case raises broad legal issues as to the jurisdiction of the district court to dismiss a declaration of taking and the justiciability of the alleged "bad faith" exception to the general rule which the district court purported to find. However, before we begin discussion of these legal issues, and especially of the "bad faith" exception, it will be helpful to note the precise factual background of the case. The "bad faith" which the district court found is set out in its memorandum of March 14, 1963, as follows (R. 78-79):

> Mr. Suchy's examination of the instant property was aimed at determining what damage would be caused to the property by the easement

herein. His assessment that no damage would occur was based upon the supposition that whatever damage the road might cause had already been paid. In view of the fact that the easement herein would permit the Government to completely change the nature of the roads involved, this supposition seems patently erroneous. Mr. Suchy himself came close to admitting as much, in his statement that his report, based upon the above assumption, would be incorrect if such an assumption were incorrect.[1]

It thus appears that Mr. Suchy's determination that the easement herein would cause only nominal damage to the mining claims was based upon a clearly erroneous legal assumption as to the effect of the judgment against Bates Lumber Co. In view of said error, it follows that the report submitted by him to the Department of Agriculture was so defective as to amount to a mere guess as to the decrease in value to follow from the proposed easement herein. Under such a set of circumstances, it cannot be said that the estimate by the Department of Agriculture that

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[1] (Appellant's footnote) The Government does not agree that Mr. Suchy's testimony was made on the basis of an incorrect assumption. Reading the record as a whole, we believe that the fair interpretation of Mr. Suchy's testimony was that he estimated damages on the basis of the road, including all the fill dirt necessary for its construction, already being in place over the mining claims (see especially R. 113-114). That the fill dirt and road were already on the mining claims is an undisputed fact. It is immaterial that Mr. Suchy may have expressed himself inaptly in speaking in terms of the Bate Company damage suit rather than the actual condition of the property as he found it. We do not pursue this matter, however, since in our view it is simply another tangent to the real issue in the case.

> just compensation for the taking of the easement would be $1 was made in good faith, that is, with a reasonable basis for belief as to its accuracy.

In substance, Mr. Suchy, the fully qualified mining engineer whom the Secretary of Agriculture had chosen to make an estimate of damages, took into account a fact which the district court did not think should be considered in estimating just compensation. This Court in a condemnation proceeding has equated "bad faith" with "fraudulent action." *Simmonds* v. *United States*, 199 F.2d 305, 306-307 (C.A. 9, 1952). Taking the strongest case that possibly could be made under any view of the facts against the Government, at most it could be charged with an erroneous interpretation of law. But, "It [bad faith] does not mean merely poor judgment or careless planning," but rather "actual malevolence, or spite" directed toward the condemnee. *United States* v. *40.75 Acres of Land in DuPage County, Ill.*, 76 F. Supp. 239, 249 (N.D. Ill. 1948). Thus, as noted by the court in *United States* v. *Southerly Portion of Bodie Island, N.C.*, 114 F.Supp. 427, 430 (E.D. N.C. 1953): "To allege bad faith a party must charge facts rather than conclusions, and such facts must suggest actual malevolence by the officer towards the complaining party." And, of course, even if there were something in the present case which remotely resembled such "bad faith," it would have to be proved—a matter which, like fraud, must be established by clear and convincing evidence.

There is no hint that Mr. Suchy or the Department of Agriculture officials who relied on his report were motivated by fraud, malice or personal ill will against the appellees. No chicanery or connivance is shown in the evidence. There is not the slightest indication that the government officials intended to cheat the appellees out of the fair market value of their claims. Nor is there any intimation that deception was practiced on the appellees.

To the extent that fair market value might be underestimated, whether the legal or economic theories are the causative factor, the disadvantage is with the United States. The Government must pay 6% interest on the deficiency from the date of taking until the date compensation is finally paid. Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. sec. 258a. The Government can borrow money at interest rates considerably below 6%. It is clearly not to the Government's economic advantage to underestimate just compensation. As in all the cases where there is alleged to be a lack of good faith, it is simply a refusal of the district court to agree with the economic and legal result reached by the administrative officials. In effect, as the Fifth Circuit noted in *In re United States*, 257 F.2d 844, 848 (1958), cert. den., 358 U.S. 908, the district court, under the guise of a good faith test, imposes its financial judgment on the administrative officials. If the administrative officials disagree with the court's financial judgment, they must either not use the declaration of taking procedure at all, or submit an estimate of just compensation in which they do not believe. This Circuit

has previously held that the district court cannot so substitute its judgment for that of the responsible administrative officials. *United States* v. *Merchants Transfer & Storage Co.*, 144 F.2d 324, 326 (1944). The only alternative to such an estimate of just compensation in which the administrative official did not believe would be physical seizure. No purpose would be served by forcing the United States to abandon its orderly procedure in favor of physical seizure. *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 340 (1963).

It is apparent from the district judge's comments at the hearing of December 17, 1962, that the court was disturbed chiefly by the fact that only one dollar had been deposited (R. 141-142). The court was incredulous that anything these days could be worth only one dollar (R. 141). Accordingly, the United States emphasizes what it believes to be evident. The United States may use a condemnation proceeding to effect a quiet title. *United States* v. *93.970 Acres*, 360 U.S. 328 (1959). The nominal deposit of one dollar is simply an assertion that the United States already owns the property right described in the complaint and declaration of taking except for mere technical rights outstanding which have only a nominal value, if any. Even where the Government doesn't own the underlying fee, the compensation may be only nominal. *State of Washington* v. *United States*, 214 F.2d 33 (C.A. 9, 1954), cert. den., 348 U.S. 862; *Terminal Coal Co.* v. *United States*, 172 F.2d 113 (C.A. 3, 1949). See also *United States* v. *16*

Parcels of Land in City of St. Louis, 281 F.2d 271 (C.A. 8, 1960). Therefore, even if the "good faith" or "bad faith" of the proper administrative officials were a legitimate issue, the fact that there was a deposit of nominal compensation would not of itself be a determinative factor in deciding the issue. We now turn to the precise legal issues involved.

I

The District Court Has No Jurisdiction To Dismiss A Declaration of Taking

When, pursuant to the provisions of the Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. sec. 258a-258f, the United States filed the declaration of taking and deposited the estimated compensation in the registry of the district court, title to the estate described in the declaration of taking vested in the United States. *United States* v. *Carey,* 143 F.2d 445, 450 (C.A. 9, 1944). Upon the filing of the declaration of taking and the passing of title to the Government, the district court is powerless to dismiss the proceeding.[2] *United States* v. *Hayes,* 172 F.2d 677, 679 (C.A. 9, 1949), and cases there cited. *A fortiori,* the district court is powerless to dismiss the declaration of taking.

The Declaration of Taking Act enables the United States to acquire title simply by depositing funds "for or on account" of just compensation to be award-

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[2] This assumes that the taking is authorized by a statute valid under the Constitution. *Catlin* v. *United States,* 324 U.S. 229 (1945).

ed the owners rather than by making payment pursuant to court order. *United States* v. *Dow*, 357 U.S. 17, 23 (1958). The scheme of the Declaration of Taking Act makes it plain that, when the Government files a declaration before it has entered into possession of the property, the filing constitutes the "taking" (*Ibid.*). The court does not award the right of possession nor adjudge the title. The Declaration of Taking Act gives the right of possession, without the necessity of any court order, though it is orderly to get one.[3] *In re United States*, 257 F.2d 844, 846 (C.A. 5, 1958), cert. den., 358 U.S. 908. Cf. *United States* v. *Merchants Transfer & Storage Co.*, 144 F. 2d 324 (C.A. 9, 1944).

This interpretation of the Declaration of Taking Act is entirely consistent with the overall scheme of the federal taking of property. Broadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: It can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various acts of Congress providing authority for such takings. *United States* v. *Dow*, 357 U.S. 17, 21 (1958). Under the first method—physicial seizure—no condemnation proceeding is instituted and the property owner is provided a remedy under the Tucker Act, 28 U.S.C. secs. 1346(a)(2) and 1491, to recover just compensation.

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[3] The Act authorizes the court to fix the time for possession (40 U.S.C. sec. 258a) but, since the right to possession follows title, this merely covers a reasonable time for moving out.

Under the second procedure, the Government can wait until just compensation is judicially determined before it pays the award and enters possession, thereby taking the land. Or it can acquire title and right of possession before just compensation has been judicially determined by filing the declaration of taking and depositing just compensation under the Declaration of Taking Act (*Ibid.*).

We shall not belabor the general rule that, when the United States files the declaration of taking and deposits estimated just compensation, title passes from the landowner to the Government, and that, where there is authority for the taking, the district court is thereafter powerless to deprive the Government of its title and revest it in the landowner except as Congress may by statute provide. The district court's opinion of March 14, 1963, indicates that it was cognizant of the general rule as announced in the above-cited decisions of this Circuit (R. 80). The district court proceeds further, however, to find an exception "where a showing of lack of good faith is made" (*Ibid.*). It has already been noted in the introductory remarks of this brief that there has been no showing of bad faith by government officials in the particular facts of this case. We shall now examine what is more basic, that the "bad faith" exception as to the deposit which the district court purported to find in the decided cases does not exist at all.

II

The Allegation Of The Defendant In A Condemnation Suit That The Estimate Of Just Compensation For A Declaration Of Taking Has Been Made In Bad Faith Does Not Present A Justiciable Issue

As a matter of authorities, there is not, as the district court conceived it, a conflict of decision. As we spell out later herein, there is, in our view, no final decision which supports the district court's asserted jurisdiction to review adminstrative action. On the contrary, the Fifth Circuit has ruled on this precise point that the purported bad faith exception to the rule of finality of the administrative estimate of just compensation does not exist and that a trial court has no jurisdiction to set aside a declaration of taking or to deny possession because it concludes that the deposit is inadequate. *In re United States*, 257 F.2d 844 (C.A. 5, 1958), cert. den., 358 U.S. 908. We now analyze the reason why we believe this decision is clearly correct and should be followed by this Court.

"Good faith" and "bad faith" are not statutory standards. The Declaration of Taking Act says nothing about the "good faith" or the "bad faith" of the acquiring agency in estimating just compensation. The language of the statute is that "Said declaration of taking shall contain * * * (5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken." Therefore, the question is simply whether the acquiring agency has included in the declaration of taking

a statement of the sum estimated to be just compensation. There is no question but that this has been done.

The nature and purposes of the Declaration of Taking Act were described as follows in *United States* v. *Miller*, 317 U.S. 369, 381 (1943):

> The purpose of the statute is two-fold. First, to give the Government immediate possession of the property and to relieve it of the burden of interest accruing on the sum deposited from the date of taking to the date of judgment in the eminent domain proceeding. Secondly, to give the former owner, if his title is clear, immediate cash compensation to the extent of the Government's estimate of the value of the property. The Act recognizes that there may be an error in the estimate, and appropriately provides that, if the judgment ultimately awarded shall be in excess of the amount deposited, the owner shall recover the excess with interest. * * *

The *Miller* case rejected the argument that the United States might not recover back the excess of the deposit above the final verdict. The Supreme Court said (p. 381):

> The payment is of estimated compensation; it is intended as a provisional and not a final settlement with the owner; it is a payment "on account of" compensation and not a final settlement of the amount due. To hold otherwise would defeat the policy of the statute and work injustice; would be to encourage federal officials to underestimate the value of the property with the result that the Government would be sad-

> dled with interest on a larger sum from date of taking to final award, and would be to deny the owner the immediate use of cash approximating the value of his land.

The Supreme Court contemplated the possibility that officials would intentionally underestimate the value of the property to protect the Government. The *Miller* reasoning was thus premised on the view that the administrative estimate was conclusive.

Congress plainly gave its acquiring authority, not the courts, the function of estimating just compensation for this purpose. And the lack of court review is evident from the fact that when the declaration is filed and the deposit made in court "title to the said lands * * * shall vest in the United States, and said lands shall be deemed to be condemned * * *." Had Congress intended court review of the declaration or the amount of the estimate, it would have provided for some court action by way of approval before title passed. It did not require any court action in this particular. Likewise, because it did not contemplate any court action, it made no provision for response by the condemnee or even for notice prior to vesting of title.

The tentative nature of the estimate was recognized in *United States* v. *1,997.66 Acres of Land, More or Less, Etc.*, 137 F.2d 8 (C.A. 8, 1943), where, in reversing the district court for refusing to permit increases and decreases in deposits made for various tracts, the court said (p. 14):

> The court could not govern its action by any personal opinion of whether the judgment of the

> acquiring officer or authority, as reflected in either the original or the revised estimate, was good or bad, *for that officer or authority had exclusive authority to estimate the amount of provisional just compensation*, and his good faith determination of the sum of money thus to be deposited was not subject to judicial review. * * * (Emphasis supplied.)

The delay necessarily resulting from court examination of the amount of the deposit in adversary proceedings demonstrates the lack of jurisdiction for the court to engage in such an undertaking. Court proceedings must be brought on by pleadings of some sort. Here the district court could not decide between whether this should be done by the answer or a separate motion to dismiss (R. 56, 64-65). Inevitably, delays occur in the legal procedures of filing motions, bringing them on for hearing and presenting the evidence and argument concerning the amount of compensation. Thus, in the instant case, while possession was sought on February 5, 1962, it was not until March 14, 1963, that the district court made its final ruling (R. 85, 87). In other cases the delay might, of course, be greater depending on how thoroughly the court might feel inclined to pursue the subject of value before ruling.

These time-consuming procedures prior to the award of possession are directly contrary to the purposes of the statute which, as the courts have emphasized, was enacted to prevent the government project from being delayed by legal proceedings, including appeals. *United States* v. *Miller*, 317 U.S.

369 (1943); *Catlin* v. *United States*, 324 U.S. 229 (1945). The taking of possession prior to payment has been exercised by the United States since the earliest days by physical seizure, leaving the landowner to his remedy of a suit under the Tucker Act. *United States* v. *Dow*, 357 U.S. 17, 21 (1958). In requiring the deposit of estimated compensation, Congress was conferring upon landowners benefits not constitutionally required. See *Garrow* v. *United States*, 131 F.2d 724 (C.A. 5, 1942), cert. den., 318 U.S. 765. This does not empower the court to enlarge that grant to include a power of the landowner or the court to control the amount of the deposit. It should be noted that the deposit in no way affects substantial rights of landowners. *Catlin* v. *United States*, 324 U.S. 229 (1945). The estimate in no way binds them, and has "no bearing whatsoever on value." *Chapman* v. *United States*, 169 F.2d 641, 644 (C.A. 10, 1948), cert. den., 335 U.S. 860.

We have already mentioned the delays that inevitably result from the exercise of the power asserted by the court below. Not to be ignored is the cumbersome procedure thereby created of, in effect, two trials as to the amount of compensation, the extent of the first trial depending upon the completeness of the court's review of the estimate.[4] The question here is purely one of statutory construction since the Decla-

[4] Here the basis of the alleged bad faith is the court's disagreement with the Government's theory of nominal compensation. There is every likelihood that, after the trial as to compensation, another appeal will be necessary if the court does not change its legal theory.

ration of Taking Act is creating rights not previously existing. To imply jurisdiction to review the administrative estimate of just compensation would be contrary to the terms of the statute and its purposes, would defeat its objectives and would impose completely unnecessary burdens on the court. Congress was satisfied that condemnees were sufficiently protected without such court review. It should not, we submit, be implied.

In re United States, 257 F.2d 844 (C.A. 5, 1958), cert. den., 358 U.S. 908, refused to imply such power. In that case, as in the present one, the district court was of the opinion that the estimate of just compensation must be a good faith, fair and honest estimate, and that if the court should be of the opinion that the estimate was not made in good faith, but arbitrarily, then the district court could vacate the declaration and refuse to give the Government possession. The Fifth Circuit rejected this view, saying (257 F.2d at p. 848):

> With deference to the contrary views of the district judge, we deem the settled law to be that the purported bad faith exception to the rule of finality of the administrative estimate of just compensation does not exist, that, in short, the courts have no jurisdiction to review the amount of estimated compensation, none to set aside or vacate a declaration of taking, none to refuse a declaration of possession on the grounds asserted here. If the law were otherwise, a district judge, under the guise of determining whether the declaration of taking was in good faith and the amount tendered sufficient to es-

> cape the charge that it was arbitrary or fraudulent, could superintend the whole act of taking, vesting title, and acquiring possession, and thereby prevent its accomplishment unless the amount estimated measured up to his idea of what that amount should be.

The district court, in the present case, acknowledged that it disagrees with the holding of the Fifth Circuit in *In re United States* (R. 66). It relies instead on the contrary views of the district court which the Fifth Circuit reversed as erroneous. *United States* v. *Certain Interests in Property (Hillsborough County)*, 161 F.Supp. 424 (S.D. Fla. 1958). Another case on which the district court relied for authority that a contention of bad faith is cognizable before the courts is *United States* v. *45.33 Acres (County of Princess Anne, Va.)*, 266 F. 2d 741 (C.A. 4, 1959) (R. 73).

A careful reading of the opinion shows that that case was based entirely on a failure to prosecute the action and that the complaint, as well as the declaration of taking, was dismissed. The court expressly refrained from deciding the good faith issue, saying, 266 F.2d at p. 744, " * * * we do not find it necessary to consider either the authority of the Court to inquire into the adequacy of the deposit or the good faith of appellant in making such deposit." This construction is supported by the Fourth Circuit's later opinion in *United States* v. *2,974.49 Acres (Clarendon County, S.C.)*, 308 F.2d 641 (1962), which reversed the dismissal of a declaration of taking.

The third case relied on by the district court to support its notion that it could inquire into the good faith of the acquiring agency is *United States* v. *44.00 Acres (Monroe County, N.Y.)*, 110 F.Supp. 168 (W.D. N.Y. 1953), rev'd, 234 F.2d 410 (C.A. 2, 1956) cert. den., 352 U.S. 916. Again, the district court's opinion was reversed by the court of appeals. The Second Circuit said in reversing, 234 F.2d at p. 415, " * * * the district court had no power to set aside the first amended Declaration of Taking, and its order so doing is void."

In summary, of the three cases relied on by the district court, two were reversed on the ground that there is no authority to vacate the declaration of taking, and the third was decided on other grounds expressly leaving the good faith issue open. Additional support for the Fifth Circuit's view is the similar holding as to nonreviewability of the selection of land to be taken. In *United States* v. *Mischke*, 285 F.2d 628, 631 (C.A. 8, 1961), the court held:

> We cannot accept the theory that the assertion by a defendant in a condemnation proceeding that the official, duly authorized by Congress to select the lands necessary to be taken for a public use, has acted in bad faith and arbitrarily and capriciously in making the selection, can transmute what has invariably been held to be a legislative question into a judicial one.[5]

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[5] We think that this case is clearly correct in holding that there is no "bad faith" exception from the rule precluding judicial review of administrative determinations to take particular property. Although there is dictum in lower

The two leading cases holding that it is beyond the power of the district court to vacate a declaration of taking are this Court's decisions in *United States* v. *Carey*, 143 F.2d 445, 450 (1944), and *United States* v. *Hayes*, 172 F. 2d 677, 679 (1949). These cases hold that, with the filing of a declaration of taking and deposit of estimated just compensation, title vests in the United States and the district court is thereafter powerless to dismiss the proceedings. The district court examined these and related cases only to conclude that "The cases appear to be in hopeless conflict as to whether a United States District Court has authority to vacate a declaration of taking, where a showing of lack of good faith is made" (R. 80). With regard to the *Hayes* and *Carey* cases, it is said that "The Court of Appeals for the Ninth Circuit has indicated that no such authority exists under ordinary circumstances, i.e., *where there is a failure to make a showing of bad faith* * * *" (*Ibid.*, emphasis supplied). Good faith or bad faith is not discussed in either the *Hayes* or *Carey* cases. The Ninth Circuit simply holds that, once title vests by the filing of the declaration of taking and the deposit of estimated just compensation, the court is powerless to vacate it. There is no intimation of any exceptions, for bad faith or otherwise.

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court decisions of existence of this power, the Supreme Court cases, properly analyzed, deny it. Compare *Berman* v. *Parker*, 348 U.S. 26 (1954), with the district court opinion, whose reasoning it rejected and whose judgment it modified by striking asserted limitations on the right of the agency to take property it thought it needed. *Schneider* v. *District of Columbia*, 117 F.Supp. 705 (D.C. 1953).

Nor do the other cases in which the district court purported to find a "hopeless conflict" contain a single instance in which the dismissal of a declaration of taking has been sustained. *Travis* v. *United States*, 287 F.2d 916 (C.Cls. 1961); *United States* v. *64.88 Acres (Allegheny County, Pa.)*, 244 F.2d 534 (C.A. 3, 1957); *United States* v. *284,392 sq. ft. (Kings County, N.Y.)*, 203 F.Supp. 70 (E.D. N.Y. 1962); *United States* v. *Certain Interests in Property (Cascade County, Montana)*, 163 F.Supp. 518 (D. Mont. 1958); *United States* v. *51.8 Acres (Nassau County, N.Y.)*, 147 F.Supp. 356 (E.D. N.Y. 1956); *United States* v. *48,752.77 Acres of Land, More or Less (Adams and Clay Counties, Neb.)*, 50 F.Supp. 563 (D. Neb. 1943). To the contrary, these cases generally support *Hayes* and *Carey* that a declaration of taking cannot be dismissed, title having vested in the United States. It is only by seizing upon individual expressions in these opinions, out of context, that any support at all can be found for the opposite conclusion. In addition, the district court might also have considered the recent Fourth Circuit decision in *United States* v. *2,974.49 Acres (Clarendon County, S.C.)*, 308 F.2d 641, 643 (1962), where the court, in following the *Hayes* case said, "Once it had determined that the condemnation was authorized by statute and that the statutory requirements had been complied with the court was without power to dismiss the condemnation proceedings and Declaration of Taking."

III

If The Order Dismissing The Declaration Of Taking Is Not An Appealable Order, It Is Requested That This Brief Be Treated As A Petition For Mandamus

A. *The order is appealable.*—The main issue in the case before the district court is the amount of just compensation, if any, to which the defendant is entitled. The taking of possession, deposit of estimated just compensation, and transfer of title under the Declaration of Taking Act are entirely ancilliary to, and separate from, the issue of just compensation.[6] Indeed, the declaration of taking procedure is so independent that the issue of just compensation could be determined without the procedure ever being used. *United States* v. *Dow*, 357 U.S. 17, 22 (1958). Therefore, when the district court set aside and vacated the declaration of taking in its order of March 14, 1963, that was a final and appealable order under the collateral orders doctrine.

In its enunciation of this doctrine in recent years the Supreme Court has said that those decisions are final and appealable under 28 U.S.C. sec. 1291 which "fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Bene-*

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[6] Except only that the date of valuation and the amount of interest due are affected by the filing of the declaration of taking and deposit.

ficial Loan Corp., 337 U.S. 541, 546 (1949). This doctrine has been specifically applied, where as in the present case, "Appellate review of the order * * * at a later date would be an empty rite * * *." *Swift & Co.* v. *Compania Caribe*, 339 U.S. 684, 689 (1950).

At last year's term, the Supreme Court applied the collateral orders doctrine to two cases somewhat like our own. In our case, the district court has mistakenly exercised its jurisdiction to dismiss a declaration of taking. In so doing, the district court has exercised a jurisdiction it does not possess, as we have shown above, pp. 29-38.

In *Construction Laborers* v. *Curry*, 371 U.S. 542 (1963), the state courts of Georgia erroneously asserted their jurisdiction to deal with a controversy which was beyond their power and instead within the exclusive domain of the National Labor Relations Board. The Supreme Court held the Georgia court order determining jurisdiction was an appealable collateral order, saying, 371 U.S. at p. 548: "The issue on the merits, namely the legality of the union's picketing, is a matter entirely apart from the determination of whether the Georgia court or the National Labor Relations Board should conduct the trial of the issue." Similarly in *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963), it was held that an order from a Texas state court determining which of two Texas courts had proper venue to entertain an action against two national banks was a final and appealable order. The Supreme Court said, 371 U.S. at p. 558: "This is a separate and independent matter, anterior to the merits and not enmeshed in the

factual and legal issues comprising the plaintiff's cause of action."

While it is believed that the order dismissing the declaration of taking is appealable, it is recognized that it is a close and difficult legal question not wholly free from doubt. The first case which must be disposed of in resolving this doubt is *Catlin* v. *United States*, 324 U.S. 229 (1945), where it was held that a "judgment" entered on a declaration of taking and a subsequent order denying the landowner's motion to vacate the judgment and dismiss the petition were not final and appealable orders. The basis of the decision is that the "judgment" entered on a declaration of taking is not a judgment at all in the true sense. The Court points out, at 324 U.S. p. 239, that "the statute does not purport in terms to authorize such a 'judgment' as was entered in this cause or to make its entry the event upon which title is changed, if so summary a procedure could be valid." This view, of course, supports the main burden of our argument in this brief that the district court has no jurisdiction to interfere with the filing of a declaration of taking. After clarifying the nature of the "judgment" in the case, one is left with the general rule that the order denying a motion to dismiss is never a final and appealable order, even when based on jurisdictional grounds. *Catlin* v. *United States*, 324 U.S. 229, 236 (1945); *Libby, McNeill & Libby* v. *Malmskold*, 115 F.2d 786, 787 (C.A. 9, 1940). And the *Catlin* case involved not, as here, a collateral issue but one of the two basic questions of all condemnation cases, i.e., the right to take.

In the present case, however, the fact is that the district court has dismissed the declaration of taking. This makes the present fact situation more analogous to the opposite rule that the order dismissing an action is a final, appealable order. *Aldridge* v. *States Marine Corp. of Delaware*, 265 F.2d 554, 555 (C.A. 9, 1959); *Allen* v. *Schnuckle*, 253 F.2d 195, 196 (C.A. 9, 1958); *Mantin* v. *Broadcast Music*, 244 F.2d 204, 205 (C.A. 9, 1957); *Fern* v. *United States*, 213 F.2d 674, 676 (C.A. 9, 1954); *Siegmund* v. *General Commodities Corp.*, 175 F.2d 952 (C.A. 9, 1949); *United States* v. *Hayes*, 172 F.2d 677, 679-680 (C.A. 9, 1949). Thus, it is believed that the *Catlin* case, which held that the order denying a motion to vacate the "judgment" on the declaration of taking was not appealable, would not be controlling here where the court dismissed the declaration of taking itself.

The second case which must be explained is *In re United States*, 257 F.2d 844, 846 (C.A. 5, 1958), cert. den., 358 U.S. 908, where it is said that: "As all, including the petitioner, agree, the order is not appealable." The statement that the petitioner, the United States, agreed that the order dismissing the declaration of taking is not appealable, undoubtedly arises from a misunderstanding of the Government's brief. There was no oral argument in that case. In its brief, the Government contended in the alternative, as it does here, that the writ of mandamus or prohibition should issue even if the order were not appealable. The brief takes the position that the order of dismissal is appealable, however.

The Fifth Circuit relies on two cases in addition to *Catlin* for the proposition that the order dismissing the declaration of taking is not appealable. *Dade County, Florida* v. *United States*, 142 F.2d 230 (C.A. 5, 1944), and *United States* v. *Richardson*, 204 F.2d 552 (C.A. 5, 1953). The *Dade County* case is very similar to the *Catlin* case in that the trial court simply entered an order on the validity of the declaration of taking and overruled the objections of the condemnee to the order. It is, for all practical purposes, the same as a denial of a motion to dismiss. In the *Richardson* case, the district court was exercising its undeniable prerogative to refuse to lend its judicial powers for the prosecution of a case where the plaintiff refused to answer requested admissions. That this was the view of the court of appeals is clear from the following, 204 F.2d at p. 555:

> The order of June 30, 1952, directs that this cause be not dismissed but that the cause and any prosecution of it by petitioner against Richardson and his lands should be abated. The order did not purport to interfere with the statutory consequences of compliance with the Declaration of Taking Act. It simply withdrew and suspended the judicial assistance which petitioner had invoked ex parte against appellee.

It is the Government's view in the present case that it is precisely because the district court's order does "purport to interfere with the statutory consequences of compliance with the Declaration of Taking Act" that the order is a final and appealable one.

B. *In any event, the district court's order dismissing the declaration of taking may properly be reviewed by this Court by writ of mandamus or prohibition.* — Assuming *arguendo* that the district court's order is not an appealable one at this time, *In re United States*, 257 F.2d 844 (C.A. 5, 1958), cert. den., 358 U.S. 908, is again directly in point that mandamus is proper. There can be little doubt that a later appeal would be futile. There will be no other final order in the case until after just compensation has been determined. The matter at issue is the Government's right of possession pending the determination of just compensation, that right deriving from the filing of the declaration of taking and deposit of estimated compensation. But once the actual compensation has been determined, the right of possession pending that determination is obviously a moot question. Since a later appeal would be frustrated, appeal is clearly an inadequate remedy and this Court may protect its appellate jurisdiction by use of a writ of mandamus. *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 255 (1957); see *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 385 (1953); *Ex Parte Fahey*, 332 U.S. 258, 260 (1947).

An even stronger reason for the use of the writ of mandamus or prohibition than the inadequacy of the appeal is that the district court ruled on a matter beyond its jurisdiction: viz., the adequacy of the deposit of estimated just compensation. *In re United States*, 257 F.2d 844 (C.A. 5, 1958), cert. den., 358 U.S. 908. There is no question that this Court has supervisory power over the district courts of this

Circuit in aid of this Court's appellate jurisdiction. *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 255, 259 (1957). The Supreme Court there said, in speaking of the right of the court of appeals to issue a writ of mandamus, "The question of naked power has long been settled by this Court." The historic use of writs of prohibition and mandamus directed by an appellate to an inferior court has been to afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling the inferior court to exercise its authority when it is its duty to do so. *Ex Parte Peru*, 318 U.S. 578, 583 (1943). Where the lower court has issued an order which is beyond its jurisdiction, the appellate court may issue a writ of mandamus to effect the vacation of such order. *United States* v. *Smith*, 331 U.S. 469 (1947). Where the district court has denied a litigant a constitutional or statutory right to a jury trial, the writ of mandamus is available to correct the wrong. *Beacon Theatres* v. *Westover*, 359 U.S. 500, 511 (1959). So here, where the district court had denied the Government its statutory right to possession, mandamus is available.

The power to mandamus extends to cases where its issuance is either an exercise of appellate jurisdiction or *in aid of appellate jurisdiction.* "That power protects the appellate jurisdiction which might be otherwise defeated and extends to support an ultimate power of review, though it not be immediately and directly involved." *United States* v. *District Court*, 334 U.S. 258, 263 (1948). Thus, the authority of this Court is not confined to the issuance of

writs in aid of a jurisdiction already acquired but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 25 (1943).

CONCLUSION

The district court's memorandum and order of March 14, 1963, purporting to set aside and vacate the declaration of taking, should be declared null and void, and the district court instructed to enter an appropriate order granting possession of the property here involved to the United States.

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October, 1963.

Certificate of Examination of Rules

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A. Donald Mileur,
Attorney,
Department of Justice,
Washington, D. C., 20530.

APPENDIX

In accordance with Rule 18, paragraph 2(f), the exhibits which are a part of the record in this case were identified, offered and received as evidence at the following places in the record:

	Identified, offered and received as evidence without objection:
Exhibit #1, Map showing location of mining claims	R. 94
Exhibit #2, Aerial mosaic showing Elliott Creek Road	R. 97
Exhibit #3, Mr. Suchy's report of January 23, 1961, entitled "Comments on the proposed interruptable easement for the Elliott Creek Road within the boundaries of the W. L. Cobb, et al., placer claims."	R. 104
Exhibit #4, Letter from the Secretary of Agriculture to the Attorney General dated October 4, 1961, setting forth certain statements concerning the one dollar deposit	R. 105

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